

September 2001

Separation of PES businesses:

**Review of C39 of the proposed new
distribution licence**

Proposals Paper

Executive summary

This document considers the responses received from the consultation paper “separation of PES businesses: review of C12 licence obligations” published in February 2001. It proposes amendments to Condition 39 of the proposed new electricity distribution licence¹ to take account of recent developments in the industry, to avoid duplication of licence obligations and to remove, as far as possible, the need for derogations.

Condition 39 of the distribution licence requires the managerial and operational independence of the distribution business from all other businesses. It defines all information arising from the management and operation of the distribution business as confidential. It addresses concerns that companies that ran both supply and distribution businesses had the potential to distort competition in the supply of electricity.

All respondents to the February 2001 consultation paper agreed that as a minimum Condition 39 should allow distribution businesses to undertake multi-utility work without requiring a derogation. However, respondents diverged on how much further freedom distribution businesses should be allowed in this area.

The paper proposes the following amendments to Conditions 39 and 40:

- ◆ distribution information need only be kept confidential from gas and electricity supply businesses, electricity generation and gas shipping businesses held by companies associated to the distribution business. This obligation does not apply to information made equally available to all supply and shipping businesses;
- ◆ the need to maintain full managerial and operational independence has been replaced by a requirement not to restrict, distort or prevent competition in supply, shipping or generation;
- ◆ distribution Licensees are required to produce a report, which can be updated with Ofgem permission, outlining how they will achieve the two main obligations. This report will include details of arrangements for any shared property, personnel, premises or services. It is proposed that the specific prohibition on such sharing be replaced by the requirement not to restrict, distort or prevent competition in supply,

¹ Presently Condition 12 of the PES licence.

shipping or generation. Licensees are also required to use reasonable endeavours to comply with the measures set out in the report. The report will be published on the distribution company's website;

- ◆ Condition 40, the requirement to appoint a compliance officer, will be retained. The compliance officer's duties will be extended to include monitoring and reporting on conditions other than Condition 30 in so far as those other conditions affect the Licensee's independence from the supply business;
- ◆ there is no facility for derogation in the amended condition. The paper proposes that where a distribution business no longer possesses a supply, generation or shipping business this condition could be switched off under the terms of Condition 2.

Copies of the proposed amended Conditions may be found in Appendices 2 and 3.

Views are invited on the proposed amendments by 26 November 2001.

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1. Introduction

Purpose of this document

- 1.1 This document considers the responses received to the consultation paper "Separation of PES businesses: review of C12 licence obligations" published in February 2001. It proposes amendments to Condition 39 of the proposed new electricity distribution licence² to take account of recent developments in the industry and to remove the need for derogations. Any such amendments will take place from 1 April 2002.

Background

- 1.2 Condition 39 of the proposed distribution licence³ requires the managerial and operational independence of the distribution business. It was introduced to the Public Electricity Supplier (PES) licence as Condition 12⁴ on 1 April 2000 to address concerns that companies that ran both supply and distribution businesses had the potential to distort competition in the supply of electricity. The condition requires the absolute confidentiality of information collected by or appertaining to the distribution business. It also prevents the use by any affiliate or associate of the licensee of any staff, premises, property, equipment, or systems for recording, processing or storing data, used by the distribution business.
- 1.3 Most PESs have in place time-limited derogations against this condition that ameliorate its effects. The derogations are conditional on the licensee following a separation plan that has been agreed with Ofgem. These plans provide for all agreed actions to achieve separation to be completed by 1 April 2002. Some shared services are allowed until 1 April 2005. Condition 39 is supported by Conditions 4A and 36A of the new distribution licence. These conditions ensure that licensees do not discriminate between suppliers in the provision of services.

² Presently Condition 12 of the PES licence.

³ Published by DTI in August 2001.

⁴ Condition 8 in the Scottish PES licence

- 1.4 The Utilities Act takes separation a step further by providing for the introduction of a new distribution licence and a ban on the same Companies Act company holding both a supply licence and a distribution licence. These provisions are expected to be commenced on [1 October 2001]. The Act also introduces a new provision for financial penalties to be applied in cases of licence breach.

Rationale

- 1.5 Developments in the industry, including the growth in multi-utility work by distribution businesses and joint ventures providing operation of services to more than one company have meant that derogations were required to allow PESs to take advantage of the benefits of such developments. Further, the Utilities Act, by requiring supply and distribution licences to be held by separate Companies Act companies, will change the structure of the industry significantly. In the course of consulting on the conditions of the new distribution licence Ofgem agreed⁵ to undertake a separate consultation exercise on the new Condition 39. This was because there was a concern that Condition 39 would duplicate some of the provisions of other Conditions in the new distribution licence. The relevant conditions are:

- ◆ Condition 43, which provides for the financial ring fencing of the distribution business and restricts the activities of the licensee;
- ◆ Condition 44, which requires the licensee to ensure sufficient resources are available to the distribution business to comply with its licence obligations; and
- ◆ Condition 47, which prevents the distribution business from being used to guarantee the indebtedness of other companies within its group, without the consent of the Authority.

Some PESs had also pointed out a number of drafting anomalies. A consultation paper was therefore issued in February 2001⁶ that discussed the need for change to this condition.

⁵ "Utilities Act standard licence conditions – final proposals" Ofgem October 2000

⁶ "Separation of PES businesses: review of C12 licence obligations"

- 1.6 Views were invited on the extent of obligation that would provide sufficient protection for suppliers whilst allowing maximum flexibility for the distribution business to develop. Views were also invited as to the continuing role of the compliance officer under Condition 40.
- 1.7 This paper responds to the views received and proposes amendments to Conditions 39 and 40.

References

- 1.8 The following documents are referred to in this consultation paper:
- "Utilities Act standard licence conditions – final proposals" Ofgem October 2000
 - Utilities Act standard licence conditions DTI August 2001
 - "Separation of PES businesses: review of C12 licence obligations" Ofgem February 2001.

Structure of document

- 1.9 Chapter 2 summarises the options considered in the February 2001 consultation paper and discusses the responses received. Chapter 3 proposes a way forward. Chapter 4 invites views and outlines the next steps.

Timetable

- 1.10 Comments are invited on the proposals discussed in this document. The deadline for responses to this consultation is 26 November 2001. A further paper containing final proposals will be published in December 2001.

Ofgem contact

- 1.11 All responses or queries relating to this document should be sent to :

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Confidentiality

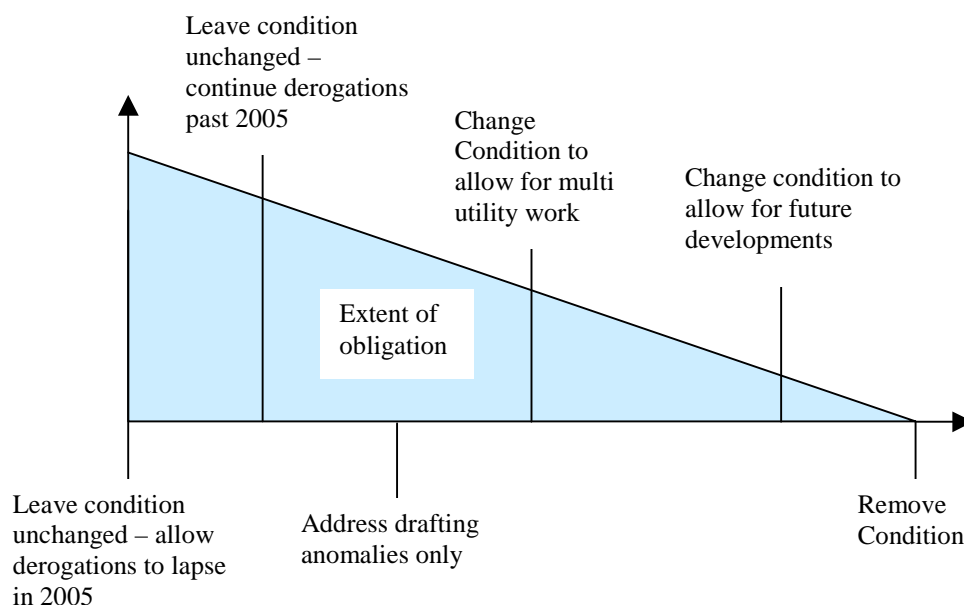
- 1.12 It is open to respondents to mark all or part of their responses as confidential. However, we would prefer it if, as far as possible, responses were provided in a form that can be placed in the Ofgem library.

2. Consideration of respondents views

Summary of options considered

- 2.1 The February 2001 consultation paper considered a range of possibilities for the extent of regulatory obligations to be contained in Condition 12, as shown in Figure 1 below.

Figure 1: Range of possibilities



- 2.2 Ofgem's initial view was that it should be possible to change the condition to allow for multi-utility work and for future developments without compromising protection for suppliers.
- 2.3 The paper requested views on the following questions:

Condition 12

- ◆ What specific provisions would be necessary to protect the interests of suppliers?
- ◆ What extent of regulatory obligation provides sufficient flexibility to the distribution businesses to allow for future developments without impinging on protection for suppliers?

- ◆ Should the use of derogations be continued and if so, till when?

Condition 12A⁷

- ◆ What should be the future role of the Compliance Officer?
- ◆ Who should be responsible for appointing the Compliance Officer?

2.4 Views were also invited as to the desirability of the distribution business making the statement of practices, procedures and systems required by Condition 12A publicly available.

Respondents' views

2.5 Respondents generally welcomed the consultation exercise. All were in favour of some relaxation of the obligations around confidentiality and the operational and managerial independence of the distribution business. All respondents agreed that as a minimum distribution businesses should be allowed to undertake multi-utility work without requiring a derogation against this condition. However, respondents diverged on how much further freedom distribution businesses should be allowed in this area. None of the respondents were in favour of retaining derogations.

2.6 Some respondents argued that Ofgem should not concentrate solely on electricity supply when considering providing protection for competitive markets within the energy industry. They considered that protection was also required for the gas supply and shipping markets.

2.7 Many respondents submitted detailed responses outlining the level of obligation they felt would be appropriate. A summary of responses is available in Appendix 1.

Ofgem's response

2.8 The responses confirm that Condition 39 as it stands at the moment is not meeting the needs of distributors and goes beyond the level of protection that

⁷ Condition 12A of the PES licence will be Condition 40 of the distribution licence.

suppliers expect. There is no support for any option that provides the distribution business with less freedom from restriction than that required to allow them to undertake multi-utility work. There is also very little support for removing the condition entirely. Those companies who have advocated such a move have themselves acknowledged that suppliers would consider such a move at this time to be premature. The question then is limited as to whether a distribution business should be allowed by this condition to undertake multi-utility work only or whether Ofgem should aim to give distributors further freedom in deciding how to run their business. The second approach would allow distributors to run their business as they see fit, subject to other licence conditions, provided only that this does not give an advantage to any particular supplier or group of suppliers.

- 2.9 It would be relatively simple to amend the condition to address drafting anomalies and to allow multi-utility working. However, it seems short sighted to allow only for existing circumstances at a time when the industry is facing rapid change. Some respondents have argued that allowing for unknown future developments is a step too far, that Ofgem should decide, after consultation with the industry, what new developments will be allowed as and when they are proposed. This approach would have the advantage of ensuring that the industry was kept informed of all future developments in the way distribution businesses were managed and operated. However, it would maintain the present level of regulatory uncertainty faced by distribution businesses when planning for the future and continue the need for either derogations or frequent licence modifications.
- 2.10 Ofgem must also consider the effect of such an approach on the regulatory burden on companies, as it would require a high level of intervention. Significant developments that involve a broadening of the work undertaken by the distribution business will be covered by Condition 43 of the distribution licence, which will impose restrictions on the activity of the licensee and introduce a financial ringfence. Developments that involve a narrowing of the focus of the Licence holder, such as the introduction of an asset management company to operate the distribution assets, will have to comply with Condition 29, which covers disposal of assets. These conditions should provide sufficient comfort to suppliers and customers that their interests will be protected. Within

the constraints imposed by Conditions 43 and 29 the licensee should be free to develop its business in whatever way it sees fit, provided that it does not inhibit the effective development of competition within the energy industry.

- 2.11 Some respondents argued that competition in gas supply and shipping should be considered as well as in electricity supply when providing safeguards against abuse of their position by the distribution business. This argument reflects the growing importance of dual fuel deals in the present energy market and the close relationship between electricity and gas supply businesses owned by the same group of companies. There is a concern that without such safeguards gas supply businesses could be used to circumvent any controls introduced to protect competition in electricity supply. It therefore seems appropriate to include gas supply and shipping when providing protection to the electricity supply business.
- 2.12 Some PESs have argued that a distribution business that no longer has an associated supply business is unlikely to see any advantage in favouring one supply business over another. They then argue that Conditions 39 and 40 in their proposed form should not be required in the licences of these distribution companies. However, it does not seem appropriate to remove these conditions from the licences of such companies, as circumstances may change. However Condition 2 of the distribution licence allows for these conditions to be switched off, and on again, at the discretion of the Authority with the Licensee's consent.
- 2.13 One respondent argued that provisions in the gas transporter licence covering confidentiality and use of shared property and systems could be substituted for Conditions 39 and 40. Whilst consideration of these provisions, together with the existing Conditions 39 and 40, will be a useful starting point, it would be inappropriate at this stage not to take into account the progress the energy industry has made since these conditions were introduced.
- 2.14 Some respondents argued that the obligation to ensure that shared services, where in place, are the most efficient way of the distribution business achieving such services, is out of place in this condition. Ofgem agree that it would sit more naturally in the accounting condition. However, should the new

accounting condition presently under consultation fail to include such a provision, it will be reintroduced to Condition 39.

3. Proposals

Condition 39

- 3.1 Ofgem proposes to limit the definition of confidential information and the extent of confidentiality required. At present the licensee is required to keep all information relating to the operation and management of the distribution business confidential from all persons except in certain tightly defined circumstances. This would be replaced with a requirement to ensure that any distribution information accessible to a competitive business owned by the same group of companies as the licensee, would also be accessible on the same terms to all other competitors in the same market.
- 3.2 The present obligation that distribution businesses are provided with the resources necessary for the efficient and effective management of the business would be omitted. The need for such an obligation in this condition has been superseded by the introduction of Condition 44 "Availability of resources" in the distribution licence.
- 3.3 The remaining obligations contained in the present condition would be wrapped up in an obligation to operate the distribution business in such a way as to not prevent, restrict or distort competition in the supply of electricity and gas and the shipping of gas.
- 3.4 Distribution licensees would be required to produce a plan, approved by Ofgem, showing how they intended to comply with the obligations on confidentiality and not preventing, restricting or distorting competition in competitive services. The plan would also cover how they intended to address public perception of the independent distribution business through independent branding. Distribution licensees would be required to adhere to these plans. The plans would be published on the distribution businesses' Internet sites.
- 3.5 Appendix 2 shows a draft of the proposed Condition 39. The draft aims to achieve the following:
 - ◆ protection of competition in supply of electricity and gas and in gas shipping;

- ◆ reduction of duplication of obligations within the licence;
- ◆ freedom for distribution businesses to seek and implement economic and efficient innovations subject to the protection of competition elsewhere in the energy markets;
- ◆ elimination of the need for derogations from this condition;
- ◆ greater transparency for market players.

3.6 **Views are invited** on the extent to which these aims have been achieved by the proposed wording.

Condition 40

3.7 Ofgem proposes to retain the obligation to appoint and maintain a compliance officer. However, Condition 2 of the distribution licence allows Ofgem to switch off this condition. This will be considered wherever a distribution licence holder can show that no affiliates or related undertakings are involved in supply of electricity and gas or the shipping of gas or the generation of electricity.

3.8 It is proposed to extend the scope of the duties of the compliance officer to cover all obligations that impact on separation. These will include:

- ◆ Condition 4A, which provides for non discrimination in the provision of use of system and connection services;
- ◆ Condition 36A, which provides for non discrimination in the provision of distribution metering services;
- ◆ Condition 39;
- ◆ Condition 41, which prohibits cross subsidies
- ◆ Condition 43, which provides for the financial ring fencing of the distribution business and restricts the activities of the licensee; and
- ◆ Condition 44, which requires the licensee to ensure sufficient resources are available to the distribution business to comply with its licence obligations.

- 3.9 Appendix 2 shows a draft of the proposed Condition 40. The aims for this condition are the same as those set out in 3.5. Views are invited.
- 3.10 Consideration is being given as to whether changes to Conditions 39 and 40 in the distribution licence may need to be reflected in the relevant conditions of the transmission licence in Scotland.

4. Next steps

Views invited

- 4.1 This document invites views on the extent to which the aims expressed in paragraph 3.5 have been achieved by the proposed wording for Conditions 39 and 40 contained in Appendices 2 and 3.

Handling of Responses

- 4.2 In accordance with our normal practice, we intend to make responses to this consultation available through the Ofgem Library. However, if asked to do so, we shall respect the confidentiality of any response. Respondents wishing their responses to remain confidential should clearly mark the documents to that effect.

Timetable for Consultation

- 4.3 The deadline for responses is 26 November 2001.
- 4.4 All responses and queries relating to this consultation should be sent to:

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- 4.5 Final proposals will be published in December 2001, with the aim of implementing any amendments in April 2002.

Appendix 1: Respondents views

Distribution businesses

All distribution businesses agreed that as a minimum Condition 39 should allow for future developments as well as for multi-utility work. One company argued that there was a clear case for removing the condition altogether but acknowledged that this could cause suppliers some concern. Some distribution businesses have argued that where the ultimate holding company of the distribution licensee no longer holds a company that is licensed to supply, Condition 39 is not necessary. Others have argued that while the condition is necessary in such circumstances, the need for a compliance officer is no longer valid.

Some Public Electricity Suppliers (PESs) argued that the condition should consist of obligations not to restrict, distort or prevent competition in supply and to produce a report annually showing how they were going to achieve this. The report would be subject to Ofgem's agreement and published. The company would then be required to use "reasonable endeavours" to comply with the report. They suggest that this should provide sufficient protection for suppliers given the introduction of financial penalties for breach of licence conditions under the Utilities Act. They further argue that other licence conditions effectively cover issues of cross subsidy and the financial stability of the distribution business and that such issues should not be included in Condition 39. Some PESs also argued that there should be no requirement for arrangements for shared property, services, etc. to be the most efficient and economical way for the licensee to obtain such property, services, etc. except in so far as any such arrangements would prevent, restrict or distort competition.

Suppliers

Suppliers (and the one customer representative who responded) agree with the desirability of Condition 39 being amended to allow multi-utility work but have reservations about allowing for future unspecified developments. This was caveated by one supplier with the proviso that all suppliers should benefit equally from the efficiencies created by such arrangements. One supplier has suggested that any venture that involves the sharing of services or of data should require specific approval by

Ofgem after a public consultation exercise. It further suggests that if such approval is granted it should be a matter of public record.

Others

One respondent argued that the role of the Compliance Officer should be extended to cover compliance with all licence conditions related to separation, such as the financial ring-fencing condition and those dealing with non discrimination in the provision of services and prohibiting cross subsidy.

Two respondents, including one distribution business, highlighted the fact that the present Condition 39 does not include a requirement to maintain separate brands for supply and distribution. This was seen as an important omission from the condition.

Two respondents saw a clear need for any Compliance plans and statements required under Condition 40 to be made available to the public to allow for greater transparency of regulation.

One respondent suggested that Condition 39 of the distribution licence be replaced by the provisions of Conditions 11(1) and 11(2) of the present Gas Transporters licence. They argued that this, along with Condition 43 which provides for financial ringfencing of distribution, would allow distribution businesses greater flexibility whilst retaining effective safeguards for suppliers.

Appendix 2: Proposed modification to Condition 39

Condition 39. Restriction on use of certain information and independence of the Distribution Business

1. In this Condition:

‘Confidential information’ means information relating to, or derived from, the [management or operation of the] distribution business which is not published or otherwise legitimately in the public domain; and

‘Relevant supplier or shipper’ means the holder of an electricity or gas supply licence or a gas shipper’s licence, and ‘relevant generator’ means the holder of an electricity generation licence, which in each case is an affiliate or related undertaking of the licensee.

2. The Licensee shall put in place and at all times maintain managerial and operational systems which prevent any relevant supplier or shipper from having access to confidential information except and to the extent that the information in question is made available without restriction to any gas or electricity supplier or gas shipper
3. The Licensee shall at all times manage and operate the Distribution Business in a way calculated to ensure that it does not restrict, prevent or distort competition in the supply of electricity or gas or the shipping of gas or the generation of electricity.
4. The Licensee shall no later than 31 May 2002 have in place a statement (in this Condition “the statement”), approved by the Authority, describing the practices, procedures and systems which the licensee has adopted (or intends to adopt) to secure compliance with paragraphs 2 and 3.
5. The statement shall in particular (but without prejudice to the generality of paragraphs 2 and 3) set out how the Licensee shall:
 - a) maintain the full managerial and operational independence of the Distribution Business from any relevant shipper or supplier;

- b) design and manage the branding of the distribution business to ensure that it is perceived by the public to be fully independent from the businesses of any relevant supplier or shipper;
- c) secure that any arrangements for the use of or access to:
 - i) premises or parts of premises occupied by persons engaged in, or in respect of, the management or operation of the Distribution Business ;
 - ii) systems for the recording, processing or storage of data to which persons engaged in, or in respect of, the management or operation of the Distribution Business also have access;
 - iii) equipment, facilities or property employed for the management or operation of the Distribution Business ; or
 - iv) the services of persons who are (whether or not as their principal occupation) engaged in, or in respect of, the management or operation of the Distribution Business ;

by any business other than the distribution business or by any person engaged in or in respect of the activities of such a business shall be such as to prevent any breach of the requirements of the requirements of those paragraphs.; and

- d) manage the transfer of employees from the Distribution Business to any relevant supplier or shipper .
6. The Licensee may, with the approval of the Authority, revise the statement prepared in accordance with paragraph 4.
7. The Licensee shall take all reasonable measures to ensure compliance with the terms of the statement as from time to time revised and approved by the Authority.

8. The licensee shall publish a copy of the approved statement prepared in accordance with paragraph 4 (or the latest approved revision) on its company's website.

Appendix 3: Proposed modification to Condition 40

Condition 40. Appointment of Compliance Officer

1. The Licensee shall ensure, following consultation with the authority that a competent person (who shall be known as the “Compliance Officer”) shall be appointed for the purpose of facilitating compliance by the Licensee with Conditions 4A, 36A, 39, 41, 43 and 44.
2. The Licensee shall at all times ensure that a Compliance Officer is engaged for the performance of such duties and tasks as the Licensee considers it appropriate to assign to him for the purposes specified at paragraph 1, which duties and tasks shall include those set out at paragraph 5.
3. The Licensee shall procure that the Compliance Officer:
 - (a) is provided with such staff, premises, equipment, facilities and other resources; and
 - (b) has such access to its premises, systems, information and documentation

as, in each case, he might reasonably expect to require for the fulfilment of the duties and tasks assigned to him.
4. The Licensee shall make available to the Compliance Officer a copy of any complaint or representation received by it from any person in respect of a matter arising under or by virtue of Conditions 4A, 36A, 39, 41, 43 and 44.
5. The duties and tasks assigned to the Compliance Officer shall include:
 - (a) providing relevant advice and information to the Licensee for the purpose of ensuring its compliance with the Relevant Duties;

- (b) monitoring the effectiveness of the practices, procedures and systems adopted by the Licensee in accordance with the statement referred to at paragraph 4 of Condition 39;
- (c) advising whether, to the extent that the implementation of such practices, procedures and systems requires the co-operation of any other person, they are designed so as reasonably to admit of the required co-operation;
- (d) investigating any complaint or representation made available to him in accordance with paragraph 4;
- (e) recommending and advising upon the remedial action which any such investigation has demonstrated to be necessary or desirable;
- (f) providing relevant advice and information to the Licensee for the purpose of ensuring its effective implementation of:
 - (i) the practices, procedures and systems adopted in accordance with the statement referred to at paragraph 4 of Condition 39; and
 - (ii) any remedial action recommended in accordance with subparagraph (d); and
- (g) reporting annually to the directors of the Licensee - in respect of each year after this Condition comes into force - as to his activities during the period covered by the report, including the fulfilment of the other duties and tasks assigned to him by the Licensee.

6. As soon as is reasonably practicable following each annual report of the Compliance Officer, the Licensee shall produce a report:

- (a) as to its compliance during the relevant year with the Relevant Duties; and
 - (b) as to its implementation of the practices, procedures and systems adopted in accordance with the statement referred to at paragraph 4 of Condition 39.
7. The report produced in accordance with paragraph 6 shall in particular:
- (a) detail the activities of the Compliance Officer during the relevant year;
 - (b) refer to such other matters as are or may be appropriate in relation to the implementation of the practices, procedures and systems adopted in accordance with the statement referred to at paragraph 4 of Condition 39; and
 - (c) set out the details of any investigations conducted by the Compliance Officer, including:
 - (i) the number, type and source of the complaints or representations on which such investigations were based;
 - (ii) the outcome of such investigations; and
 - (iii) any remedial action taken by the Licensee following such investigations.
8. The Licensee shall submit to the Authority a copy of the report produced in accordance with paragraph 6, and shall give or send a copy of the report to any person who requests such a copy.

Appendix 4: List of respondents

Below is a list of respondents whose views are summarised in this report.

Distribution Businesses

East Midlands Electricity
GPU Power UK
LPN
NEDL
SEEBOARD
Scottish Power
S + S
TXU Europe Distribution
United Utilities
Western Power Distribution
Yorkshire Electricity

Supply Businesses

British Gas Trading
Yorkshire Electricity

Others

Chemical Industries Association
John Moss
John Saunders
Transco

Appendix 5: List of Recipients

This document is available on Ofgem's website. Below is a list of recipients of paper copies of this report.

Distribution Businesses

East Midlands Electricity
GPU Power UK
LPN
NEDL
NORWEB
SEEBOARD
Scottish Power
Scottish and Southern Energy
TXU Europe Distribution
Western Power Distribution
Yorkshire Electricity

Supply Businesses

Atlantic Electric and Gas plc
British Gas Trading
Eastern Energy
Enron Direct Ltd
London Electricity
Northern Electricity
npower
PowerGen
Scottish and Southern Energy
Scottish Power
SEEBOARD
Utility Link Ltd
Yorkshire Electricity

Others

Chemical Industries Association
Compliance Officers
Department of Trade and Industry
energywatch
Ofwat
Transco